No. 16422

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CALIFORNIA COMPRESS COMPANY, INC., RESPONDENT

On Petition for Enforcement of An Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This proceeding is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against the respondent on October 16, 1958, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, *et seq.*) The Board's decision and order (R. 32-36)[1] are re-

[1] References designated "R" are to the printed record. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence. Relevant portions of the Act appear in the Appendix, *infra*, p. 13.

ported at 121 NLRB No. 178. This Court has jurisdiction pursuant to Section 10 (e) of the Act, the unfair labor practices having occurred in Fresno, California, where respondent, a California corporation, is engaged in the storage, handling, and processing of cotton for shipment in interstate commerce (R. 13-14; 4, 7, 9).

STATEMENT OF THE CASE

I. THE BOARD'S FINDING OF FACT

Briefly, the Board found, that respondent's conduct in interrogating and polling its employees as to their union membership constituted interference, restraint and coercion violative of Section 8 (a) (1) of the Act. The subsidiary facts on which this finding and conclusion rest are summarized below:

A. The Union files a petition for representation and respondent expresses doubt as to the extent of the Union's support

On November 6, 1957, the International Longshoremen's and Warehousemen's Union, herein called the Union, filed a petition with the Board's Regional Office in San Francisco, requesting certification as the bargaining representative for a unit composed of all respondent's non-supervisory production and maintenance employees (R. 14; 76, 98). Paul Doty, one of respondent's attorneys, was present in the Regional Office at the time the petition was filed, and inquired of a Board field examiner in the office whether the Union had made a sufficient showing of interest to support its representation petition (R.

14-15; 98). The field examiner replied that it had (R. 15; 98). Later that day Doty telephoned respondent's General Manager, Winston Handwerker, in Fresno, California, and advised him of the filing of the Union's petition and the apparent sufficiency of its showing of interest (R. 15; 98).

Within a day or so thereafter Handwerker received a copy of the Union's representation petition (R. 14; 77, 83). He telephoned Doty in San Francisco and expressed doubt as to the authenticity of the signatures on the Union's authorization cards and as to whether enough cards had, in fact, been signed by respondent's employees to warrant the Board's processing of the representation petition (R. 15; 83-84, 98-99). In accordance with Handwerker's request, Doty returned to the Board's Regional Office where he learned that approximately eighty per cent of respondent's employees had signed Union authorization cards (R. 15-16; 84-85, 99). The same day Doty telephoned Handwerker in Fresno, and relayed this information (R. 84-85, 88-89). Doty also learned at the Regional Office that the employees' signatures on the Union cards could be authenticated by comparing them with employee endorsements on cancelled payroll checks (R. 16; 99). On December 17, 1957, respondent forwarded its November 8 payroll checks, bearing the endorsements of the employees, to the Regional Office (R. 24; 104). The Regional Director, on December 30, 1957, wrote Kenneth Avery, respondent's general counsel, informing him that the employees' signatures on the Union cards were authentic and that the Union had shown

sufficient interest to support its representation petition (R. 24-25; 104, 111, 146-147).

B. Respondent interrogates the employees as to their union activity

Shortly after Handwerker received a copy of the Union's representation petition he summoned Plant Superintendent Lawrence Young to his office and inquired if Young could ascertain whether the employees had, in fact, signed Union authorization cards (R. 16; 113-114, 121). Young replied that all he had to do was "ask the boys" (R. 16; 114). Later in the day Young, after talking to three or four of respondent's employees, assured Handwerker that "no one had signed [Union cards] or was interested in a union" (R. 16; 115-117).

Three or four days later Young spoke to a group of 40 or 50 employees in the boiler room during a rest period, telling them that he was going to ascertain which employees had signed Union cards, and adding that he would attempt to correct any grievances so that it was unnecessary for the employees to pay a representative (R. 16-17; 48-50, 120-121). Young further stated on this occasion that if any of the employees were unhappy with their working conditions, the Company would assist them in finding other jobs (R. 17; 49, 79). That same day Young called his three foremen, Charles Kuhns, Henry Hayes, and Don Robinson, to his private office and apprised them that a rumor was circulating throughout the plant that most of respondent's employees had signed Union authorization cards (R. 17; 131-132, 135). He charged the three to inquire of their

respective crew members whether they had signed Union cards and whether they were interested in unionization (R. 17; 132, 135). Young also told a group of yard employees that if the Union organized the employees, "the block men will come out in the yard and take the jobs" of the yard men (R. 18-19; 58-59, 68).

C. Respondent obtains employee signatures on an anti-union affidavit

Late in November, the Board's Regional Office notified respondent of a hearing set for December 10 on the Union's representation petition (R. 18; 77, 93, 141-142, 143). On December 4, the Company circulated the following "affidavit" to each of its employees (R. 19; 87, 124-125, 137-138, 144-145):

> The undersigned, each for himself, after first being sworn, deposes and says:
>
> > That he was on the 6th day of November, 1957, and is now, employed by California Compress Co., Inc., a corporation, at its cotton compressing plant at Nielsen Avenue and Marks Street, Fresno, California, and in such employment performs production and maintenance work; that he has not affixed his signature to any card or paper intending thereby, or being advised that such signature would be used, to support a claim of representation by International Longshoremen's & Warehousemen's Union, Independent, and that he has not knowingly signed any such document.

Pursuant to instructions from Plant Superintendent Young, Foreman Kuhns circulated the affidavit

among all of respondent's employees in the presence of their respective foremen (R. 19-20; 118-119, 124). Kuhns was to obtain the signatures of those employees who had not signed Union cards or who stated that they had signed cards without knowing what they were signing (R. 20; 118, 123).

In the course of circulating the affidavit, Kuhns advised some of the employees that if the Union came in "the block crew is liable to * * * take your job when the work is slack" (R. 71). Shortly thereafter on meeting one Merrits, a 64 year old employee who had signed a Union card, Kuhns stated, "If I were you, at your age, I would take my name off [the Union list] and tell them I didn't know what I was signing." Merritts replied that he had understood his act, and Kuhns reiterated "if I were you, at your age, I would take my name off and tell them I didn't know what I was signing." (R. 20-21; 70, 71.)

Sometime the same day Kuhns told employee Abraham Canty, who had knowingly signed a Union authorization card, that he had a petition which was being signed by those employees who opposed unionization. Kuhns asked Canty to sign the affidavit, but Canty refused, whereupon Kuhns warned "the best thing for you to do is sign this because there's not going to be * * * [an] election. You have been with us a long time and we would hate to see you go." Kuhns further cautioned Canty that if he did not sign he "would be in bad with the Company." Canty then signed the affidavit. (R. 21-22; 50-54, 139.)

Foreman Hayes admitted telling the employees under his supervision that he wanted them to sign

the affidavit whether or not they had signed Union cards (R. 134). Hayes told employee Ross that Ross should sign the affidavit as he had not known what he was signing when he signed the Union card (R. 23; 72-73). Ross was well aware of the purpose of the Union card at the time he signed it, but he also signed the affidavit at Hayes' direction, fearing for his job security if he refused (R. 74-76, 139).

On the day respondent circulated the affidavit, employee Deamour Reason discussed it with Superintendent Young, who stated that if he knew who had signed Union cards, he would fire every one of them (R. 23; 56-57, 65).

By 10 a.m. the next morning Kuhns finished circulating the affidavit and obtained the signatures of all respondent's non-supervisory employees except two or three who refused to sign (R. 20; 124-127). He returned it to Avery, respondent's attorney, who on or about the same day advised the Board that respondent would agree to a consent election (R. 106-108, 127). A few days later the Board informed respondent that a consent election could not be held because on December 9 the Union had filed an unfair labor practice charge against respondent (R. 3, 100, 101-102). Within two weeks thereafter, the Union advised counsel for respondent that it would withdraw its unfair labor practice charge if respondent would still agree to a consent election, but respondent now declined (R. 102, 108-109).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts the Board found that by interrogating employees as to their union membership, by circulating the affidavit to each employee, thus requiring him to reveal whether he was a union member, and by procuring employee signatures to the anti-union affidavit, respondent interfered with, restrained, and coerced the employees in the exercise of their rights under Section 7, thereby violating Section 8 (a) (1) of the Act (R. 33). In so holding the Board, for reasons discussed *infra*, rejected respondent's contention that it was merely engaged in a permissible means of ascertaining whether the Union had sufficient support to warrant the Board's proceeding with the representation case (R. 33).

Accordingly, the Board ordered respondent to cease and desist from such interrogation or polling and from like or related violations of the Act, and to post appropriate notices (R. 34-35).

ARGUMENT

THE BOARD PROPERLY FOUND THAT RESPONDENT UNLAWFULLY INTERROGATED AND POLLED ITS EMPLOYEES AS TO THEIR UNION MEMBERSHIP, THEREBY VIOLATING SECTION 8 (a) (1) OF THE ACT

The facts summarized above establish that respondent systematically inquired of each employee whether he had signed a Union card, by soliciting the signature of each to an affidavit repudiating the Union. Respondent accompanied this solicitation by coercive statements such as that the yard men would

lose their jobs if the Union came in, that an employee who failed to sign would be "in bad" with the Company, that the Company "wanted" the employees to sign, and that an elderly employee, in view of his age, should heed the foreman's advice and sign. The superintendent on the very day the affidavit was circulated told an employee that if he knew which employees had signed Union cards he would discharge every one of them.[2] The Board's holding that under these circumstances the interrogation and polling of the employees constituted unlawful interference, restraint, and coercion accords with settled law.

As this Court has noted, employer "interrogation as to union sympathy and affiliation has been held to violate the Act because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained." *N.L.R.B.* v. *West Coast Casket Co.*, 205 F. 2d 902, 904. In a later case, *N.L.R.B.* v. *Roberts Brothers*, 225 F. 2d 58, 60, this Court stated that whether the polling of employees as to their union affiliation violated the Act depends on the circumstances of each case. But in *Roberts*, as in the Eighth Circuit case there relied on (*N.L.R.B.* v. *Protein Blenders, Inc.*, 215 F. 2d 749), the poll consisted of a secret ballot, unaccompanied by any coercive statements, whereas in the instant case the poll

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[2] Insofar as respondent's witnesses denied the statements attributed to them, they raised only questions of credibility which "for obvious reasons . . . were for the examiner" *N.L.R.B.* v. *State Center Warehouse*, 193 F. 2d 156, 157 (C.A. 9).

enabled the employer to identify the employees who supported the Union, and the employer uttered coercive statements in the course of polling the employees. Moreover, unlike the polling in the *Roberts* and *Protein* cases, respondent did not frame a simple "for" or "against" ballot, but instead drafted a statement "skillfully worded so as to suggest adverse criticism of the Union, and the implication is plain that [an anti-union] vote is desired" *N.L.R.B.* v. *Sunshine Mining Co.*, 110 F. 2d 780, 786 (C.A. 9), certiorari denied, 312 U.S. 678. Indeed, to call the Company-circulated affidavit a "poll" is to give it undue dignity; the affidavit more closely resembled the anti-union petition which this Court held was unlawfully circulated in *N.L.R.B.* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 261-262, certiorari denied, 348 U.S. 829; see also, *N.L.R.B.* v. *Birmingham Pub. Co.*, 262 F. 2d 2, 7-8 (C.A. 5).

Nothing in *N.L.R.B.* v. *Katz Drug Co.*, 207 F. 2d 168 (C.A. 8), or in *Pratto d/b/a Globe Iron Foundry*, 112 NLRB 1200, justifies the Company's conduct. In *Katz* the employer obtained the information as to union membership in the course of preparing for trial in a state court, and in obtaining the information the employer "to safeguard against the semblance of any color of intent to coerce or persuade" "scrupulously observed" his attorney's direction to "merely give the affidavit forms to the employees individually, ask them to read the form and sign it or not sign it, as they wished, and say nothing more." 207 F. 2d at 170. Finally, in sharp contrast to the instant case, not only were the *Katz* affidavits intended to serve a legitimate purpose in the state

court proceeding (207 F. 2d at 171-172), but the employees were aware of this legitimate purpose (*id.* at 172). As for the *Globe Foundry* case, on which respondent particularly relied, nothing in that decision establishes that the employer circulated the affidavit there involved, let alone that its circulation was accompanied by coercive comment. Hence, even assuming, *arguendo*, that an employer may lawfully investigate the extent of union support instead of waiting for the question to be resolved in a Board election, the Board had ample warrant for finding, as it did (R. 33), that respondent's purpose was to undermine the Union and not to gather evidence to assist the Board in determining the authenticity of the Union's showing of interest in the representation case.[3] Cf. *N.L.R.B.* v. *J. I. Case Co.*, 201 F. 2d 597, 598-599 (C.A. 9), indicating that the substantiality of the union's showing of interest is a matter of administrative concern only and warning against "disclosure of the individual employees' desires with respect to representation [which] would violate the long-established policy of secrecy of the employees' choice in such matters" (201 F. 2d at 600).

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[3] Neither Section 8 (c) of the Act nor the First Amendment protect unlawful interrogation. *N.L.R.B.* v. *Williams Lumber Co.*, 195 F. 2d 669, 672 (C.A. 4), certiorari denied, 344 U.S. 834, and cases cited.

CONCLUSION

For the reasons stated above, a decree should be entered enforcing the order of the Board.

Respectfully submitted,

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

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